93-921

No. _____

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1993

BERNARD SULLIVAN,
Petitioner

v.

JOSEPH H. BIELUCH, JR.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. DOES THE BALANCING TEST IN *PICKERING V. BOARD OF EDUCATION* AND *CONNICK V. MYERS* PERMIT A STATE'S CHIEF LAW ENFORCEMENT OFFICER, WHEN REASSIGNING A STATE TROOPER, TO CONSIDER REASONABLY ANTICIPATED, AS OPPOSED TO ACTUAL, DISRUPTION IN LAW ENFORCEMENT SERVICES RESULTING FROM THE TROOPER'S POLITICAL ACTIVITIES?

2. DID THE COURT OF APPEALS MISAPPLY PRINCIPLES OF QUALIFIED IMMUNITY IN CONCLUDING THAT THE PLAINTIFF HAD A "CLEARLY ESTABLISHED" RIGHT TO ENGAGE IN THE ACTIVITY AT ISSUE PURSUANT TO THE *PICKERING* BALANCING TEST?

PARTIES TO THE PROCEEDINGS

The only parties to this case are those named in its caption: Joseph H. Bieluch, Jr. and Bernard Sullivan.

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OPINIONS BELOW

The District Court's ruling granting the defendant's motion for summary judgment is unreported and reproduced at pages A1 - A18 of the appendix to this petition ("Pet. App."). The opinion of the Court of Appeals for the Second Circuit is reported at 999 F.2d 666 (2nd Cir. 1993), and reproduced at Pet. App. A19 - A37. The Second Circuit denied the defendant's motion for rehearing by an unpublished order reproduced at Pet. App. A38 - A39.

JURISDICTION

The District Court granted the defendant's motion for summary judgment in this case on November 6, 1992. The plaintiff appealed and the Court of Appeals for the Second Circuit reversed on July 27, 1993. The defendant filed a motion for rehearing, which the Court of Appeals denied on September 9, 1993. This Court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law abridging the freedom of speech ...."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents this Court with the important question of whether the head of a law enforcement agency may transfer a state trooper to avoid anticipated disruption to the agency's efficiency and public confidence without infringing on the trooper's first amendment rights. This question has created a conflict in the circuits.

The plaintiff, Joseph H. Bieluch, Jr., was employed as a resident state trooper in the Town of New Hartford, Connecticut by the Connecticut State Police. At times relevant to this action, he had lived in New Hartford for over ten years.

A resident trooper acts as the operational Chief of Police in the town to which he or she is assigned, while the First Selectman acts as the administrative Chief of Police. His duties include normal police functions such as traffic enforcement and criminal investigations, in addition to educational activities in the town. A resident trooper reports through a chain of command

that reaches the Commissioner of Public Safety, the defendant in this case.

The resident trooper's other required duties include meeting with the First Selectman to discuss and share public safety concerns, assisting the town's First Selectman and budgetary officials in preparing a local public safety budget, reviewing ordinances regarding public safety with the First Selectman, assisting the First Selectman on housing code violations and supervising the town constables. Trust and confidence are necessary in the sharing of confidential information between the First Selectman and the State Police. The lack of such trust hinders effective law enforcement in the town.

In March 1990, Bieluch was elected president of the New Hartford Business and Property Owners Association, a political action group. Shortly before assuming this position, Bieluch had resigned from the New Hartford Board of Finance after the State Ethics Commission had issued an advisory opinion that Bieluch's position on the Board created a conflict of interest with

his duties as a Resident State Trooper. The political action group sought to force a referendum to rescind a recent vote authorizing the building of a new school in the town. As President of the group, Bieluch was publicly identified on some of the Association's written communications and quoted in local newspapers.

The Association petitioned for a new vote on the school building issue, but the town's selectmen, including First Selectman Reginald Smith, Jr., rejected the petition claiming it had no validity. Bieluch and the Association initiated a lawsuit against the town and its selectmen, including First Selectman Smith.

Thereafter Bieluch was elected President of a new political organization called the New Hartford Property Owner's Association. This organization actively opposed several town budgets proposed by the town's Board of Finance and circulated petitions to force referenda on these budgets, including the public safety budget. During a successful campaign to defeat the proposed budgets and to rescind the vote on the building of a new school, the organization mailed flyers

to residents of the town urging rejection of the new school and of the budgets.

On or about July 2, 1990, the defendant, Bernard Sullivan, then the Commissioner of Public Safety, received a letter signed by nine citizens of the Town of New Hartford, including the First Selectman, expressing their concerns over Bieluch's activities. In the letter, the citizens asked for the Commissioner's "consideration and assistance in solving what we believe to be an intolerable conflict of interest on the part of Joseph Bieluch, Resident State Trooper, Town of New Hartford." The letter then described Bieluch's role "at the center of an extremely divisive, ongoing political controversy in our town" and claimed that Bieluch "has assumed the role of public spokesperson - opinion-maker both in the press and at numerous public meetings." In the letter, the citizens stated their belief that "Trooper Bieluch's role is totally inappropriate for a resident state trooper" and that "[m]any of the 928 pro-school voters of New Hartford are outraged at the dishonest tactics of Trooper Bieluch's P.A.C. ... but are

genuinely afraid to speak out against a resident state trooper; afraid of possible retaliation, harassment or unequal law enforcement protection." One of the citizens who signed the letter to the defendant was Reginald Smith, Jr.

After the Commissioner received this letter, he had his staff investigate. After confirming that First Selectman Smith had signed the letter, his staff recommended that the Commissioner transfer Bieluch from his New Hartford resident trooper position. The Commissioner agreed and ordered Bieluch's transfer to Troop L in Litchfield, Connecticut, close to his home.

Bieluch was encouraged to remain active with the town, given that he is a resident. He suffered no loss of rank, and was not suspended, reprimanded or otherwise disciplined.

Shortly after his transfer, Bieluch filed this action, pursuant to 42 U.S.C. § 1983 of the Civil Rights Act of 1964, alleging that the Commissioner had violated his First Amendment rights by transferring him. After a three-day hearing, the District Court denied his

motion for a preliminary injunction. Thereafter the Court granted the Commissioner's Motion for Summary Judgment, holding that ... "the state's interests at stake in this matter [promoting the efficient operation of law enforcement] outweigh Bieluch's First Amendment interests" and that the Commissioner was entitled to qualified immunity because "his actions would not have been apparently unlawful to a reasonable official." (Pet. App. A15-A18).

Bieluch appealed to the Court of Appeals for the Second Circuit, which had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The Second Circuit, in a 2-1 decision, reversed and remanded, holding that the District Court had erred as a matter of law by failing to accord Bieluch's speech sufficient weight and that "a potential threat could not outweigh Bieluch's first amendment interest." *Bieluch v. Sullivan*, 999 F.2d 666, 670 (2d Cir. 1993). Having ruled that the potential for disruption could not suffice to outweigh Bieluch's rights, the Second Circuit erred fundamentally when it held that because the plaintiff's working relationship with

First Selectman Smith was unharmed, and the Commissioner had no evidence that the state's law enforcement functions had actually been compromised, Bieluch's rights outweighed the government's interests. *Id.* at 672-73.

The Commissioner filed a motion for reargument, which the Court denied on September 9, 1993.

REASONS FOR GRANTING THE WRIT

This case raises an important question about the application of the balancing test announced in *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), as refined by *Connick v. Myers*, 461 U.S. 138, 152, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), in the law enforcement context. Specifically, this case presents the question of whether, consistent with this Court's rulings, a Commissioner of Public Safety may reasonably anticipate injury to the public welfare resulting from the potential disruption to the operation of law enforcement activities. In ruling that the Commissioner must await actual harm to law

enforcement, the Second Circuit placed itself in conflict with other circuits and contravened one of the premises of *Pickering* and *Connick*.

The Commissioner in this case, as the chief law enforcement executive in the state, concluded that if Bieluch desired to remain active and vocal in town politics, as was his right and the Commissioner's wish, he should not remain the Town's resident State Trooper. He therefore transferred Bieluch not for disciplinary reasons, but for sound policy reasons: avoiding a perceived conflict of interest that may affect public safety and public confidence in law enforcement.[1/]

[1/]The Court should note that the Commissioner narrowly tailored his action to uphold the State's interest without punishing the plaintiff for engaging in free speech rights. Bieluch can claim no absolute right to his position as a Resident Trooper in New Hartford. His transfer was to a troop near his home. The Commissioner did not demote, reprimand, suspend or otherwise discipline him. In fact, after the transfer the Commissioner encouraged Bieluch to remain active in New Hartford politics. *Compare Egger v. Phillips*, 710 F.2d 292, 315-23 (7th Cir. 1983) (transfer did not violate plaintiff's First Amendment rights because narrowly tailored to vindicate the specific state interest at stake).

Law enforcement officials need this Court's direction in responding to anticipated problems stemming from an employee's speech in their management decisions. Requiring a law enforcement official to wait for, or ferret out, actual injury to the public welfare would undermine, and second guess, the very discretion that this Court traditionally defers to in the employment context generally and the law enforcement context specifically. Indeed, it is the need to prevent harm that forms the basis for allowing law enforcement officials broad discretion to act when reasonably anticipating injury to the public welfare. If allowed to stand, the Second Circuit's decision in this case may foster friction among law enforcement officials, distrust on the part of the public and great reluctance among law enforcement officials to take action in what they reasonably deem the public's best interests at the risk of being held personally liable for violating the employee's free speech rights.

The Second Circuit's decision in this case is worthy of this Court's review for several reasons. First, the

decision conflicts with this Court's precedent, which does not require a governmental employer to wait for actual harm or injury before taking action against an employee, but rather permits the employer to respond to reasonably anticipated harm. This Court has held that deference to such employment decisions is especially appropriate and necessary in the law enforcement context. Additionally, the Circuit Courts of Appeals are in conflict over whether reasonably anticipated, as opposed to actual disruption to law enforcement's efficiency and public confidence can never outweigh a law enforcement officer's right to free expression. This Court should resolve this schism. Finally, the Second Circuit's judgment conflicts with this Court's decisions regarding qualified immunity: the law in this area, and in this case particularly, could not have been so "clearly established" that it did not shield the Commissioner from the plaintiff's action.

I. ANTICIPATED HARM TO LAW ENFORCEMENT OPERATIONS CAN CLEARLY OUTWEIGH THE PLAINTIFF'S FREE SPEECH RIGHTS.

A. THE *PICKERING* BALANCING TEST ALLOWS FOR CONSIDERATION OF ANTICIPATED DISRUPTION.

This Court has consistently held that a State cannot condition public employment on a basis that infringes on the employee's constitutionally protected interest in free expression. *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The Court has also recognized, however, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). "Therefore, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove

employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." *Connick v. Myers*, 461 U.S. at 151, 103 S.Ct. at 1692. The Court has also noted that when "close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* This is especially true in the law enforcement context since the "promotion of safety of persons and property is unquestionably at the core of the State's police powers. . . ." *Kelley v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976).

To make out a claim that the governmental employer violated his First Amendment rights by taking action against him based on his expression, Bieluch must first demonstrate that his speech was constitutionally protected. *Mt. Healthy City Dist. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977). In

determining this, the Court applies a balancing test "between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-1735.[2/] "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. at 150, 103 S.Ct. at 1692. In this case, the government's interest concerns the effective and efficient protection of lives and public property.

2/ Some relevant considerations include "whether the Statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).

B. THE SECOND CIRCUIT HAS MISINTERPRETED *CONNICK*

After describing the *Pickering* balance test, this Court stated in *Connick*: "We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of working relationships is manifest before taking action.[3/] *Connick*, 461 U.S. at 152. The Court went on to provide the following caveat: "We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.*

Since *Connick*, the circuit courts of appeals have split on the issue of whether an anticipated threat of a disruption can outweigh an individual's free speech rights. The following cases hold that anticipated disruption can outweigh free speech rights. *See Glass v. Dachel*, 2 F.3d 733, 744 (7th Cir. 1993); *Maciariello v.*

3/ In *Connick*, the Court held that the plaintiff's speech (a questionnaire about internal office matters) did not relate to matters of such public concern that the government could not sustain its burden of proving that its need for effective and efficient discharge of public responsibility had outweighed the plaintiff's rights.

Sumner, 973 F.2d 295, 300 (4th Cir. 1992); *United States Department of Justice v. FLRA*, 955 F.2d 998, 1007 (5th Cir. 1992); *Langford v. Lane*, 921 F.2d 677, 681 (6th Cir. 1991); *Hall v. Ford*, 856 F.2d 255, 261 (D.C. Cir. 1988); *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985). Other cases have held that proof of actual disruption is required before action may be taken. *Versage v. Township of Clinton, NJ*, 984 F.2d 1359, 1364-65 (3d Cir. 1993); *Stever v. Independent School District No. 625*, 943 F.2d 845, 851 (8th Cir. 1991); *Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149, 1154 (2nd Cir. 1991).

The Second Circuit has apparently interpreted *Connick's* caveat to mean that when the plaintiff's speech concerns a matter of greater public concern than was at stake in *Connick*,[4/] potential or anticipated threats to effective law enforcement or protection of public safety can never suffice to outweigh the plaintiff's right to free expression, even when the events occur in a law enforcement setting. Thus, the Second Circuit held

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4/For purposes of this petition, the Commissioner concedes that the plaintiff's speech related to matters of public concern.

in this case that a "potential threat" to the disruption of police operations "could not outweigh Bieluch's first amendment rights." *Bieluch v. Sullivan*, 999 F.2d 666, 670 (2d Cir. 1993). The Second Circuit relied on its own case law for this proposition, which is clearly contrary to this Court's holding in *Connick*.

In *Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149 (2d Cir.), *cert. denied*, 112 S.Ct. 331 (1991), the Court held that a City personnel director's right to speak freely and truthfully in response to questions from a legislative committee investigating her department's hiring exams outweighed the City's interest in promoting efficiency in the performance of services. The Second Circuit held that without any evidence that the employee's statements actually interfered with the office's efficiency, the Court would presume no actual interference. *Id.* at 1159-60. The Court never held in *Piesco* that potential or anticipated disruption could never outweigh an employee's rights.

In the instant case, however, the Court assumed this was its previous holding, and then went further and

applied this holding to the law enforcement arena, stating: "Under *Piesco* ... a potential threat could not outweigh Bieluch's first amendment rights." *Bieluch v. Sullivan*, 999 F.2d 666, 671 (2d Cir. 1993). By so ruling, the Second Circuit has essentially changed the standard applied by this Court, expanding *Connick's* caveat to create an obstacle that can rarely be overcome. By so doing, the Second Circuit placed itself squarely in conflict with a clear majority of the circuit courts, which have held that an anticipated threat to the harmony and efficiency of a law enforcement agency can outweigh an individual employee's right to free speech. *See Glass v. Dachel*, 2 F.3d 733, 744 (7th Cir. 1993); *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992); *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1411 (8th Cir. 1990); *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989); *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 879 (4th Cir. 1984). *But see Zamboni v. Stamler*, 847 F.2d 73, 78 (3d Cir. 1988);

Connick held that an employer may act upon reasonably anticipated disruption, and need not wait for

actual disruption. The Court also noted, however, that "a stronger showing may be necessary" when the plaintiff's speech "more substantially involved matters of greater public concern." While in both *Piesco* and this case the plaintiffs' speech related to matters of greater public concern than in *Connick*, the governmental interests differed substantially. The defendant's interest in this case is much stronger than in *Piesco*, however, indeed it involves perhaps the strongest interest of all: protecting the life and property of the citizenry.[5/] Thus, this Court and numerous Courts of Appeals have recognized that this discretion in managing employees is particularly important in the law enforcement context. *See Kelly v. Johnson*, 425 U.S. 238, 247, 96 S.Ct. 1440, 47

5/ As one court of appeals has described this part of the balance: "The court must evaluate the employer's interest in maintaining efficiency, integrity and discipline. This interest is viewed as if on a spectrum 'from university professors at one end to policemen at the others.' ... Police are at the restricted end of the spectrum because they are 'paramilitary' - discipline is demanded, and freedom must be *correspondingly denied.*" *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992), *quoting Jurgensen v. Fairfax County*, 745 F.2d 868, 880 (4th Cir. 1984).

L.Ed.2d 708 (1976). *See also Wulf v. City of Wichita*, 883 F.2d 842, 861 (10th Cir. 1989) (heightened interest of a police department in maintaining discipline and harmony among employees); *McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985) (members of law enforcement agency "are subject to greater First Amendment restraints than most other citizens"); *Hughes v. Witney*, 714 F.2d 1407, 1419 (8th Cir. 1983) (Patrol, as a paramilitary force, should be accorded much wider deference than the normal governmental employer); *Egger v. Phillips*, 710 F.2d 292, 319 (7th Cir. 1983) (recognizing the "need for teamwork among agents and the high stakes that are involved in law enforcement."); *Waters v. Chaffin*, 684 F.2d 833, 839 n.12 (11th Cir. 1982) ("Because lives are often at stake, the danger of harm to a police department's discipline is too great to insist on waiting for the harm to result."),

In this case Bieluch, New Hartford's only resident State Trooper, was required to have a "close working relationship" with the town's First Selectman. The Commissioner learned that Bieluch and the First

Selectman were on opposite sides of a number of volatile local issues, including the adoption of a town budget (including a police budget) and the approval of a new school building. He also knew that Bieluch's political action committees had prepared documents referring to the First Selectman in highly uncomplimentary terms, including questioning the First Selctman's honesty. Bieluch went as far as to file a lawsuit naming the First Selectman as a defendant. The Commissioner testified at length from his twenty-five years experience in law enforcement about what he reasonably anticipated would result from the obvious disharmony between the two, including breakdowns in communications and a loss in public confidence in the town's law enforcement. (Pet. App. A43-A54). It was eminently reasonable for the Commissioner to anticipate the likelihood of this future disruption and take steps to prevent it.

The Commissioner concluded that Bieluch could not efficiently and effectively carry out his duties as resident state trooper without a stable working relationship with the First Selectman. The Commissioner

reasonably anticipated, and was properly concerned that, Bieluch's political activities hurt his relationship with the First Selectman. Further, the Commissioner reasonably concluded that in the context of heated political issues, the public would perceive Bieluch as not being a fair and impartial law enforcement officer. This is supported by the letter from the nine New Hartford citizens.

The law ought to permit law enforcement officials to make sound management decisions to prevent disruption, as the Commissioner did in this case. "[G]overnment offices could not function if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). This Court should therefore clarify this area of the law.

II. THE SECOND CIRCUIT CLEARLY MISAPPLIED THE STANDARD FOR QUALIFIED IMMUNITY BY HOLDING THAT THE PLAINTIFF'S FREE SPEECH RIGHTS WERE "CLEARLY ESTABLISHED."

Governmental officials are entitled to immunity from liability for damages if their actions do not violate

"clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Qualified immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985).

"[T]he recognition of a qualified immunity defense for high executives reflect[s] an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens,... but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Harlow v. Fitzgerald*, 457 U.S. at 807, 102 S.Ct. at 2732, quoting *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978). The courts have accommodated these conflicting concerns by generally providing governmental officials with a qualified immunity, shielding them from personal liability for civil damages, as long as their actions could reasonably have

been thought consistent with the rights they allegedly violated. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

"[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action... assessed in light of the legal rules that were 'clearly established'." *Anderson v. Creighton*, 483 U.S. at 639, 107 S.Ct. 3038, *quoting Harlow v. Fitzgerald*, 457 U.S. at 819, 102 S.Ct. 2739. Thus, in this case the defendant's qualified immunity is only defeated if the *Pickering* balance would lead to the "inevitable conclusion that the discharge of the employee was unlawful." *Busby v. City of Orlando*, 931 F.2d 764, 774 (11th Cir. 1991). The Second Circuit paid little attention to these principles, except to make the conclusory statement that "the law guaranteeing *Bieluch's* first amendment rights was clearly established," at the time of his transfer. *Bieluch v. Sullivan*, 999 F.2d 666, 673 (2d Cir. 1993). The dissent clearly disagreed. *Id.*

"Whenever a balancing of interests is required, the facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability under ... *Harlow*." *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848, 107 S.Ct. 172, 93 L.Ed.2d 109 (1986). *See also Guercio v. Brody*, 911 F.2d 1179, 1183-85 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1681 (1991); *Melton v. Oklahoma City*, 879 F.2d 706, 728-29 (10th Cir. 1989), *overruled on other grounds*, 928 F.2d 920 (10th Cir. 1991) (*en banc*); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989); *Noyola v. Texas Dept. of Human Resources*, 836 F.2d 1021, 1024 (5th Cir. 1988) ("[t]here will rarely be a basis for an a priori judgment that the termination or discipline of a public employee violated [his] 'clearly established constitutional rights.'"). As one court of appeals has held: "Because *Pickering's* constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard." *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992).

Quite simply, a determination of the outcome of the Pickering balance was not so pre-ordained that the law could be deemed "clearly established." Given this Court's holdings in *Connick*, the above described split of authority in the courts of appeals and the delicate balancing the court must undertake,[6/] it was not at all clear that Bieluch's right to free speech so outweighed the government's interest in this case as to defeat the Commissioner's qualified immunity. That the District Court ruled for the Commissioner evidences that objectively reasonable people (and courts) may disagree on the outcome of a particular balancing. It could not have been "clearly established" either that the Second Circuit in this case would apply *Piesco*, a case decided nearly a year after the Commissioner's decision to transfer the plaintiff.

Thus, the Second Circuit engaged in exactly the type of second-guessing of employment decisions that

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6/This Court stated in *Connick*: "Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Connick*, 461 U.S. at 150.

this Court has discountenanced. This sensitivity is heightened in the law enforcement context. Sound policy reasons underlay the Commissioner's decision to transfer Bieluch. The Second Circuit's decision to hold the governmental employer liable to Bieluch for not having the prescience to know how the Second Circuit would rule conflicts with this Court's decisions on qualified immunity and may foster a reluctance to make necessary decisions. The Second Circuit should have affirmed the District Court's ruling that the Commissioner's qualified immunity bars Bieluch's lawsuit.

CONCLUSION

This Court should therefore grant the defendant's petition and issue a writ of certiorari to review the Second Circuit's judgment in this case.

Respectfully submitted,

PETITIONER
Bernard Sullivan

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No. _____

In The

Supreme Court Of The United States

October Term, 1993

BERNARD SULLIVAN,
Petitioner

v.

JOSEPH H. BIELUCH, JR.,
Respondent

APPENDIX FOR PETITIONER

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 2:90CV00648 (AHN)

JOSEPH H. BIELUCH :

v. :

BERNARD SULLIVAN :

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Joseph H. Bieluch ("Bieluch") has brought this civil rights action pursuant to 42 U.S.C. §§ 1983 and 1988, and the First and Fourteenth Amendments of the United States Constitution. Bieluch claims that he was involuntarily transferred from his duty assignment as resident trooper in the Town of New Hartford because of his membership in a political organization in violation of his constitutional rights to freedom of speech, freedom of association, and freedom to petition the government. Originally, Bieluch sought monetary and injunctive relief against the defendant, Bernard Sullivan ("Sullivan"), in his individual and official capacity. However, in an earlier Ruling, the court dismissed Bieluch's claim to the extent that it sought damages against Sullivan in his official capacity. Subsequently, Bieluch retired from the state police and thus no longer seeks injunctive relief. His remaining claim is for money

damages against Sullivan in his individual capacity. Sullivan moves for summary judgment. For the reasons that follow, this motion is granted.

Facts

The following facts are undisputed:

1. Sullivan was Commissioner of Public Safety for the State of Connecticut at the time of the events in question.

2. Prior to being appointed Commissioner, Sullivan served as a police officer for 25 years and seven of those years were as the Chief of Police for the City of Hartford, Connecticut. (Transcript, 8/27/90 at 33.)

3. Bieluch has been a resident of New Hartford for ten years. (Transcript, 8/23/89 at 57; Stipulation ¶ 3.)

4. Bieluch has been employed as a trooper by the State of Connecticut for twenty-three years. (Transcript, 8/23/90 at 52; Stipulation ¶ 1.)

5. For the past seventeen years, Bieluch has been assigned to the Town of New Hartford as a resident state trooper. (Transcript, 8/23/90 at 52; Stipulation ¶ 2.)

6. At the time of the events in question, Reginald Smith, Jr. was the First Selectman of New Hartford. (Pl. Brief at 4.)

7. The Connecticut State Police have statutory authority to enter into a contractual arrangement with a town to provide a resident state trooper. (Conn. Gen. Stat. § 29-5; Transcript, 8/23/90 at 19; Transcript, 8/24/90 at 6.)

8. A resident state trooper is under the command of the barracks lieutenant for operational purposes. As resident trooper in New Hartford, Bieluch was under the command of the Troop B barracks lieutenant. The chain of command within the Connecticut State Police runs from Bieluch, the resident trooper, to the resident trooper sergeant, Brian Logan, to the Troop B lieutenant, Lt. Raymond Watrous. (Stipulation ¶ 5.)

9. Lt. Watrous reports to the commander of the Western District, Major James Darby, who reports to the Lieutenant Colonel for Operations, who reports to Sullivan, the Commissioner of State Police. (Stipulation ¶ 6.)

10. The duties of a resident state trooper comprise the normal police functions such as traffic enforcement and criminal investigations. Resident troopers also perform educational activities in the Town such as drug awareness programs, traffic safety, and other informational programs designed to further public safety. A resident trooper works with less supervision than a road patrol trooper. (Stipulation ¶ 12.)

11. A resident state trooper acts as the operational Chief of Police and the First Selectman acts as the administrative Chief of Police. (Transcript, 8/24/90 at 7.).

12. State troopers including resident state troopers are allowed use of the their vehicles 24 hours a day and are considered on duty 24 hours a day. (Transcript, 8/24/90 at 8; Transcript, 8/23/90 at 85.).

13. State troopers including resident state troopers are required to carry their weapon and badge with them 24 hours a day. (Transcript, 8/24/90 at 8.)

14. A state trooper must exercise discretion and judgment in the enforcement of the law. (Transcript, 8/24/90 at 27; Transcript 8/27/90 at 43.)

15. A resident state trooper is expected to assist the Town's First Selectman and budgetary officials in preparing a local public safety budget. (Transcript, 8/24/90 at 10.)

16. Town constables report to the resident state trooper for operational reasons and to the Town's chief executive officer for administrtaive reasons. (Transcript, 8/24/90 at 8-9; Transcript, 8/23/90 at 20.)

17. In addition to law enforcement activities, a resident state trooper is expected to review ordinances with the Town's First Selectman in regard to public safety. (Transcript, 8/24/90 at 9.)

18. A resident state trooper is expected to assist the First Selectman on housing code violations. (Transcript, 8/24/90 at 9.)

19. Bieluch was elected president of a political action group named the New Hartford Business and Property Owners Association in March 1990. (Stipulation ¶ 23.) Bieluch was publicly identified on some of the Association's written communications as Resident of the Association and was quoted in local newspapers as a member of the Association. (Pl. Compl ¶ 9; Stipulation ¶ 30.)

20. The group was comprised of business owners and residents of the Town who were interested in having a new referendum conducted on a recent vote authorizing the building of a new school. (Stipulation ¶ 23.)

21. The group petitioned the Town for a new vote but the selectmen, including First Selectman Smith, rejected the petition claiming that it had no validity. (Stipulation ¶ 24.)

22. When Town officials refused to grant a new election based on these petitions, Bieluch and other group members initiated a law suit against the Town of New Hartford and the selectmen of the Town, including First Selectman Smith. (Pl. Compl. ¶ 8; Transcript, 8/23/90 at 63.)

23. Reginald Smith, Jr., was a named defendant in the suit brought by Bieluch. (Pl. Compl. ¶ 8.)

24. The Superior Court law suit was setled and the selectmen scheduled a referendum after receipt of a new petition. The vote authorizing construction of a new school was subsequently rescinded. (Pl. Compl. ¶¶ 10-11; Stipulation ¶ 26.)

25. Thereafter, the previous Assocation was dissolved and Bieluch was elected president of a new political organization called the New Hartford Property Owner's Association. (Stipulation ¶ 27.)

26. The new organization took positions opposing two budgets proposed by the Town Board of Finance. In each case, the organization supported petitions to

force referenda on the proposed budgets. In both instances, sufficient signatures were submitted, referenda were held and both budgets were defeated. (Stipulation ¶ 28.)

27. Before the reconsideration vote on the school and before each of the two budget votes, organizations of which Bieluch was president sent fliers to residents of the Town through the mail urging rejection of the new school and of the budgets. (Stipulation ¶ 29.)

28. Bieluch was elected to the Town Board of Finance and then resigned after a state ethics committee ruled that as a resident state trooper, his position on the Board was inappropriate. (Hearing on Mot. Summ. Judgmnt., 10/20/92; Stipulation ¶ 31.)

29. On or about July 2, 1990, the defendant received a letter from nine citizens of the Town of New Hartford expressing their concerns regarding Bieluch's activities as president of the New Hartford Property and Business Owner's Association and the successor organization, the New Hartford Property Owners Association. (Transcript, 8/24/90 at 22; Pl. Ex. A.)

30. Reginald Smith, Jr., was one of the citizens who signed the letter to Commissioner Sullivan. (Transcript, 8/24/90 at 24, 34; Stipulation ¶ 9.)

31. Although Reginald Smith, Jr. did not sign the letter in his capacity as First Selectman, the state police later verified it was in fact he who had signed the letter. (Transcript, 8/23/90 at 25, 28.)

32. The letter received by Sullivan also expressed the residents' fear of speaking out against Bieluch for fear of retaliation. (Pl. Ex. A, Transcript, 8/27/90 at 35, 45-45.)

33. Sullivan made the decision to transfer Bieluch. (Transcript, 8/27/90 at 35.)

34. On July 13, 1990, Bieluch met with Lt. Hiltz and Lt. Watrous and was informed that he was being transferred to the Litchfield barracks. (Transcript, 8/23/90 at 32, 129-130; Stipulation ¶ 19, 20.)

35. At the July 13, 1990, meeting, Bieluch was informed by Lt. Hiltz that his transfer was not for disciplinary reasons, that it involved his political actions in the town, and, that it was being done in the belief that it was in the Town's, Bieluch's and the Department's best interests. (Transcript, 8/23/90 at 32-33, 78-79; Stipulation ¶ 21.)

36. Bieluch was assigned to Troop L in Litchfield, Connecticut, after being transferred from the resident state trooper program in New Hartford, Connecticut. (Transcript, 8/23/90 at 88; Stipulation ¶ 20.)

37. Troop L. is either the closest or second closest troop to Bieluch's home. (Transcript, 8/23/90 at 99.)

38. The official policy of the state police states that the "success" of the contractual services provided by the resident state trooper program "is based, to a large extent, on effective communications. Effective communications must occur at several levels between the town

and the Division of State Police." (Def. Ex. A; Transcript, 8/23/90 at 36.)

39. A trooper is paid from the time he enters his car at his home. (Transcript, 8/24/90 at 21.)

40. Lack of trust and confidence between the first selectman and the state police would hinder law enforcement. (Transcript, 8/23/90 at 141-142.)

41. Effective law enforcement activities by a resident state trooper involve communcation and cooperation between the barracks commander, the resident state trooper, and local officials. (Transcript, 8/23/90 at 37, 39-41; Def. Ex. A.)

42. The resident state trooper program is unique because of the trooper's relationships within the town as its primary law enforcement official. (Transcript, 8/23/90 at 54, 135-136.)

43. The First Selectman never communicated or discussed his displeasure with Bieluch. (Transcript, 8/23/90 at 76.)

44. The plaintiff has personally appeared at town budget hearings and expressed his views. (Transcript, 8/23/90 at 121-122.)

Standard

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Rule 56 (c), Fed. R. Civ. P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

256 (1986). A dispute regarding a material fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir. 1992) (quoting *Anderson*, 477 U.S. at 248).

After discovery, if the non-moving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." *Aldrich*, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 152 (1991). *See also Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780, 788 (2d Cir. 1992).

Discussion

Sullivan argues that he is entitled to qualified immunity because a reasonable official would have found that Bieluch's First Amendment rights were outweighed by the government's interest in promoting effective law enforcement in New Hartford. The court agrees.

The qualified immunity defense protects government officials from civil liability arising from the

performance of their discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *accord Cartier v. Lussier*, 955 F.2d 841, 843 (2d Cir. 1992); *Giacalone v. Abrams*, 850 F.2d 79, 85 (2d Cir. 1988).[1/]

To be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This inquiry "requires the court to consider the operation of the rule in the context of "the circumstances with which [the official] was confronted." *Giacalone*, 850 F.2d at 85 (quoting *Anderson*, 483 U.S. at 640).

Bieluch contends that because Sullivan's subjective motivation remains a genuine issue of fact, resort to summary judgment is inappropriate.[2/] Specifically,

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[1/]The *Harlow* Court noted that while the case involved immunity available to federal officials, "it was untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 457 U.S. at 819 n. 30. Thus, the same standard applies in the present action concerning a state official.

[2/]The court is mystified by Bieluch's reference to *Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991), for the proposition that a "Section 1983 plaintiff can carry

(footnote cont'd)

Bieluch states "the core fact at issue is whether or not the plaintiff's political speech was a motivating factor in the defendant's decision to transfer him." (Pl. Brief at 29.) Bieluch's argument confuses the immunity analysis with the substantive analysis required to decide the merits of the § 1983 action. Here, the court does not address the substantive issues because the court finds that the issue of immunity is dispositive.

Although the immunity inquiry is fact-specific, it does not, contrary to Bieluch's argument, "reintroduce into qualified immunity analysis the inquiry into official's subjective intent." *Anderson*, 483 U.S. at 641. Rather, the question whether an official is protected by qualified immunity "turns on the 'objective legal reasonableness' of the action." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 818-819). Therefore, because the defense is predicated on an objective, not subjective, standard, the issue may be properly

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(footnote cont'd from previous page)

his burden if a first amendment case with purely circumstantial evidence and thus survive summary judgment on qualified immunity grounds." (Pl. Brief at 30.) In *Rattner*, the Second Circuit reversed the summary dismissal of the free speech claim, but the Court did not address the qualified immunity claim. Indeed, the Court specifically stated that it expressed no view as to the issue of qualified immuntiy because the district court did not rule on the issue. *See Rattner*, 930 F.2d at 210 ("We express no view as to the merits of the contentions not ruled by the district court.").

determined upon summary judgment. *Harlow*, 457 U.S. at 818; *see also* Charles T. Putnam & Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense in Actions Under 42 U.S.C. § 1983*, 12 Bridgeport L. Rev. 665, 689 (1992) (the "thrust of *Harlow* was to enable defendants in civil rights actions to assert qualified immunity in the preliminary stages of the litigation through summary judgment.").

Generally, the Second Circuit has followed a two-tiered analysis to determine whether officials are protected by qualified immunity from civil liability arising from their discretionary functions as public employers. First, the court must determine whether the employee has First Amendment rights at issue. Next, once it is established that First Amendment rights are indeed implicated, the court must balance the employee's interests in those rights with the state's interests in effective government operations. *See, e.g., Giacalone v. Abrams*, 850 F.2d 79 (2d Cir. 1988). *See also Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). An official is protected by qualified immunity where a court determines that a reasonable official would find that the balance between the state's interests and the employee's rights weighs in favor of the state. *Giacalone*, 850 F.2d at 88.

A. Matter of Public Concern

Applying the Second Circuit's analysis, the court must first determine whether Bieluch's speech was clearly protected at the time of his transfer. *Giacalone*, 850 F.2d at 86. In the context of public employment, this inquiry hinges on whether the speech touched upon a matter of public concern. "If it did not, it does not enjoy First Amendment protection." *Giacalone*, 850 F.2d at 86. Unless Bieluch's conduct can be fairly characterized "as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers*, 461 U.S. 138, 147 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context ... as revealed by the whole record." *Id.* at 148.

According to the record, Bieluch's speech concerned town budgetary issues and was expressed in his role as president of the taxpayers' groups through various printed materials and public appearances. Thus, the context and content of his speech indicate that the speech addressed matters of public concern. This establishes that Bieluch's speech was clearly protected at the time of his transfer. This does not, however, end the court's inquiry; the court must next establish the nature and weight of these rights in light of the competing state interests.

B. Balance Analysis in Public Employment Context

Although a public employee does not relinquish First Amendment rights, those rights are qualified in the public employment context. This is because the "State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Connick*, 461 U.S. at 140 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). Thus, to determine whether the unlawfulness of Sullivan's conduct was sufficiently apparent to defeat qualified immunity, *see Giacalone*, 850 F.2d at 85, the court must balance Bieluch's First Amendment rights with the state's interest in preserving efficient management of law enforcement in New Hartford. Where the state's interest outweighs the employee's protected rights, an official's conduct in furtherance of the state's interests may be said to be reasonable and thus protected by qualified immunity.

1. Nature of public employee's expression

Sullivan's burden in justifying Bieluch's transfer depends on the nature of Bieluch's expression. *See Connick*, 461 U.S. at 150; *Giacalone*, 850 F.2d at 87. The nature of the expression, and thus the protection it warrants, is determined by the time, place, and manner of the public employee's speech. Bieluch's political activity arose from his concern as a New Hartford

citizen about the budgetary policies of the town; the speech was not related to internal office policy, nor was it intended merely as an employee grievance. To this extent, the court agrees with Bieluch that his political expression was of the type that usually merits full protection. *See Connick*, 461 U.S. at 145.

2. State interest in promoting efficient public service

However, although Bieluch's First Amendment interests are strong, the court agrees with Sullivan that the state interests at stake in this matter outweigh Bieluch's First Amendment interests. In the Ruling denying Bieluch's motion for preliminary injunction, the court previously found that Sullivan's conduct was justified because of the state's interest in promoting the efficient operation of law enforcement. The court notes that although it is not bound by its previous finding, *University of Texas v. Camenisch*, 451 U.S. 388 (1981); *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (1922), *cert. denied*, ___ U.S. ___, 61 U.S.L.W. 3005 (1992), Bieluch has not offered any evidence that would prompt the court to depart from the finding. As president of the New Hartford Property and Business Association ("Association"), Sullivan waged a public campaign seeking a new town referendum. Among the strategies employed to further this campaign, Bieluch circulated petitions, mailed flyers signed by him to citizens of New Hartford, and, along with fellow residents, Bieluch brought a civil action against several town officials

seeking an order requiring the Board of Selectman to schedule a special town meeting.

Bieluch insists that his efficacy as a trooper was not compromised by his political activity. Bieluch maintains that even if his political activity caused friction between himself and local officials, such friction has no impact on the operation of New Hartford law enforcement. In support of this, Bieluch argues that First Selectman Smith did not, as originally asserted by Sullivan, request that Bieluch be transferred. Bieluch's urgings misinterpret the court's task. To evaluate the state interest, and, consequently, the objective reasonableness of Sullivan's action, the court need not find as an empirical matter that Bieluch's activities created discord within the Town. Rather, the court must evaluate whether a reasonable official would have perceived that Bieluch's speech threatened effective police operations. *See Connick*, 461 U.S. at 1512 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

"*Pickering* suggests that maintenance of discipline and preservation of close working relationships involving personal loyalty or confidence can be relevant to the employer's interest." *Giacalone*, 850 F.2d at 87. The court finds that Sullivan has offered sufficient evidence that Bieluch's activities posed a potential threat to these concerns. *See Connick*, 461 U.S. at 154 (limited First

Amendment rights were outweighed by employer's reasonable belief that employee's speech would be disruptive); *cf. Trachtman v. Anker*, 563 F.2d 512, 519 (2d Cir. 1977) ("The inquiry of the district court should have been limited to determining whether [school authorities] had demonstrated a substantial basis for their conclusion that [the speech] would result in significant harm."), *cert. denied*, 435 U.S. 925 (1977). *But cf. Piesco v. City of New York*, 933 F.2d 1149, 1161 (2d Cir. 1991) (government officials not entitled to qualified immunity where there was no evidence of disruption caused by the protected speech), *cert. denied*, ___ U.S. ___, 112 S. Ct. 331 (1991).

Moreover, Sullivan did not transfer Bieluch solely on the basis of the potential disruptive impact of Bieluch's political activity; Sullivan only acted after he received a letter from nine New Hartford residents, including First Selectman Smith, that contained strong language indicating that the residents believed that Bieluch's role as president of the Association constituted "an intolerable conflict of interest." (Def. Ex. D at ¶1.) The letter charged, among other charges, that Bieluch personally circulated the petitions and conducted the Association's business from his office in Town Hall. The letter concluded in bold type that the residents believed Bieluch's conduct was "totally inappropriate for a resident trooper." (Def. Ex. D at ¶ 6.) Furthermore, Bieluch had previously resigned from the Board of Finance because an ethics committee had

found that his position on the Board created a conflict of interest. In the wake of this background, Sullivan had reason to be concerned that Bieluch's activities as president of the taxpayers' groups also created conflicts of interest between Bieluch and the Town.

Based on the undisputed facts, the court finds that a reasonable official would have concluded that the balance between the state's and Bieluch's interests weighed in favor of the state and that Sullivan's conduct was reasonable and narrowly tailored to address the state's interest in effective law enforcement. Therefore, the court finds that Sullivan's actions would not have been apparently unlawful to a reasonable official. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), and thus Sullivan is entitled to qualified immunity. Because Bieluch no longer seeks equitable relief, this issue disposes of Bieluch's claim in its entirety.

CONCLUSION

For the foregoing reasons, Sullivan's motion for summary judgment (filing no. 48-1) is granted.

SO ORDERED this 5th [handwritten] day of November, 1992 at Hartford, Connecticut.

/s/

Alan H. Nevas
United States District Judge

999 FEDERAL REPORTER, 2d SERIES

Joseph H. BIELUCH, Jr.,
Plaintiff-Appellant

v.

Bernard SULLIVAN, Commissioner of Public Safety, I/O, Defendant-Appellee.

No. 1368, Docket 92-9314.

United States Court of Appeals,
Second Circuit.

Argued April 22, 1993.
Decided July 27, 1993.

GEORGE C. PRATT, Circuit Judge:

Plaintiff Joseph H. Bieluch, Jr., appeals from a summary judgment granted by the United States District Court for the District of Connecticut, Alan H. Nevas, *Judge*, holding that qualified immunity protected defendant Bernard Sullivan from liability under 42 U.S.C. § 1983 for summarily transferring Bieluch from his position as resident trooper. For the reasons set forth below, we reverse.

FACTS AND BACKGROUND

Bieluch joined the Connecticut police force in 1967. In 1973, he became one of two "resident troopers" for the Town of New Hartford, Connecticut. Connecticut's resident trooper program is designed to provide community-based policing for towns lacking an organized police force. A resident trooper is functionally equivalent to a chief of police and is a highly desired, prestigious position. As a resident trooper, Bieluch had flexible hours and diverse duties, received an additional stipend of $100 per month, and was under less superision than regular "road troopers". His duties included performing educational activities in the town; supervising the town constables; and assisting the town's First Selectman in preparing a local public-safety budget, reviewing public-safety ordinaces, and monitoring hosuing-code violations. Bieluch was a New Hartford resident trooper for seventeen years; his summary transfer in 1990 precipiated this lawsuit.

In 1980 Bieluch and his family moved to New Hartford, because he wanted to live in the same town where he worked. As a private citizen, he became active in community affairs. He was elected to New Hartford's Board of Finance, but after the State Ethics Commission issued an advisory opinion stating that his position on the board created a conflict of interest under state laws, he resigned from the board in March 1990. That same month he was elected president of the New Hartford Business and Property Owner's

Association, an organization dedicated to overturning a referendum that had approved the construction of a new school. Bieluch was publicly identified on some of the association's written communications as the president and was quoted in local newspapers as a member of the association.

The association circulated petitions calling for the town's Board of Selectmen to rescind their votes authorizing construction of a new school. The board refused to act on the petition, which prompted the association to file a lawsuit against the town and its selectmen. Bieluch was a named plaintiff in the suit, and First Selectman Reginald J. Smith, Jr., was a named defendant. The suit was settled after the town agreed to schedule a referendum to reconsider the issue. The second referendum rescinded the previous approval for the construction of a new school. Its mission accomplished, the association dissolved.

A new organization, the New Hartford Property Owners' Association, formed in May 1990 and elected Bieluch as its president. The organization effectively campaigned against several town budgets proposed by New Hartford's Board of Finance by supporting petitions to force referenda on proposed budgets. At times, the association distributed flyers or mailings to New Hartford residents. Bieluch also personally appeared at town budget meetings and expressed his views. When the fiscal year began on July 1, 1990, the town did not have a budget in place.

Bernard Sullivan was appointed to the position of Connecticut's Commission of Public Safety in November 1989. The Commissioner of Public Safety supervises the resident troopers. Conn. Gen. Stat. § 29-5. On or about July 2, 1990, Sullivan received a letter signed by nine New Hartford residents that expressed concern over Bieluch's political activities. REginald Smith was one of the signatories, but he had signed the letter as a private citizen, without indicating his position as First Selectman.

The letter to Commissioner Sullivan criticized the tactics employed by both of the organizations of which Bieluch had been president. It said that Bieluch had "placed himself at the center of an extremely divisive, ongoing, political controversy", which was "totally inappropriate for a resident state trooper". As examples of his "unethical public conduct and conflict of interest", the letter contained the following allegations:

--Prior to the May 15 referendum to rescind, Trooper Bieluch promised a "secret plan" for a cheaper solution to school space needs. This was widely reported in the press. Yet Trooper Bieluch betrayed the public trust placed in him as a Building Committe [sic] member by publicly refusing to reveal or discuss this plan with fellow committe [sic] members.

--On May 10, 1990 a neutral forum chaired by a professional moderator was held for pro- and anti-school groups to air their views. Trooper Bieluch's

P.A.C. was formally invited to participate as panel members. The enclosed letter expressed his refusal.

--During several school referenda Trooper Bieluch's patrol car has been conspicously parked a polls, providing well-recognized anti-school publicity.

--Trooper Bieluch personally circulated the petition to repeat the school referendum. (How many citizens feel safe or comfortable refusing their Resident Trooper in this role?)

--After the school defeat, Trooper Bieluch's P.A.C. began their assault on our town budget using similar tactics of exageration and distortion.

--After one budget defeat May 30, 1990, Trooper Bieluch's P.A.C. has now forced a 2nd budget referendum scheduled June 26, 1990. These actions have recklessly squandered public funds, denied citizens their right of line item veto at a Town Meeting and seriously threaten our town's ability to function as of a new fiscal year July 1, 1990.

--Trooper Bieluch's P.A.C. has publicly targeted our education budget, seeking staff cuts, even though the Education budget has a net increase of only 6% over last year with an increase in enrollment of 5.8%.

--Trooper Bieluch has conducted the business of the N.H. Property and Business Owner's Association from his office in Town Hall and on company time.

Several documents were attached to the letter, including copies of petitions for the school construction

referendum, newspaper articles, and various materials distributed by the association.

Sullivan asked his subordinates to check into the matter, but they did not verify the truthfulness of any of the eight allegations of unethical conduct. They did confirm that the Reginald Smith who had signed the letter was the First Selectman, and they recommended transferring Bieluch from his New Hartford resident trooper position. The First Selectman acts as the administrative chief of police. He is not superior to the resident trooper, but has a working relationship with him.

Less than two weeks after Sullivan received the letter, he decided to transfer Bieluch. When Bieluch's immediate commanding officer, Lieutenant Watrous, contacted Smith and told him that Bieluch might be transferred, Smith said that he would like to see Bieluch replaced because he felt that Bieluch's political activities were affecting his work. At a meeting on July 13, 1990, Bieluch was infomred that effective August 1, 1990, he was being transferred to Litchfield, Connecticut, a town fifteen miles away from New Hartford. Lieutenant James D. Hiltz, the commanding officer for Bieluch's district, told Bieluch that the transfer was not a disciplinary measure, but the result of his political activities in the town. Bieluch was not given a hearing, nor was he asked about the allegations in the letter. When Bieluch asked for a copy of the letter, his request

was declined. His new position in the Litchfield barracks was not a resident trooper position.

Bieluch filed this action under 42 U.S.C. § 1983 in August 1990, alleging violations of his first and fourteenth amendment rights. He originally sought monetary and injunctive relief against Sullivan in his individual and official capacities. After a three-day hearing, Bieluch's motion for a preliminary injunction was denied on October 4, 1990. The district court also dismissed Bieluch's claim for damages against Sullivan in his official capacity. After Bieluch retired from the police force in 1992, he dropped his claim for injunctive relief. With respect to the remaining claim for damages against Sullivan in his individual capacity, the district court granted summary judgment for Sullivan in November 1992, holding that qualified immunity protected Sullivan from liability.

Bieluch now appeals, claiming that in finding qualified immunity the district court did not properly balance his first-amendment interests against the state's interest in efficient law enforcement. More specifically, Bieluch claims that Sullivan's actions were not objectively reasonable and that his summary dismissal based on mere concern about potential disruption of police functions, without evidence of actual interference and without affording Bieluch any opportunity to respond to the unsubstantiated charges, was not a sufficient basis on which to find qualified immunity at the summary judgment stage of this case. We agree.

DISCUSSION

[1,2] Summary judgment is appropriate when no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. We review grants of summary judgment *de novo*, drawing all inferences in favor of the nonmoving party. *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989). Therefore, Bieluch must have his allegations taken as true, and is entitled to receive the benefit of the doubt when his assertions conflict with those of Sullivan. *See Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149, 1154 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331, 116 L.#d.2d 272 (1991).

[3,5] The affirmative defense of qualified immunity shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Anderson v. Creighton*, 483 U.S. 615, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). Whether qualified immunity is warranted "generally turns on the 'objective legal reasonableness' of the action". *Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038 (quoting *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2739). If the law claimed to have been violated was clearly established, the immunity defense ordinarily should fail, since a reasonably competent

public official should know the law governing his or her conduct. *Harlow*, 457 U.S. at 818-19, 102 S.Ct. at 2738-39.

[6,7] Public employees do not relinquish their first-amendment rights when they begin working for the government, *Rankin v. McPherson*, 483 U.S. 378, 383-84, 107 S.Ct. 2891, 2896-97, 97 L.Ed.2d 315 (1987); *Piesco*, 933 F.2d at 1155; nevertheless, the government does have an interest in regulating the speech of its employees that is significantly different from its interests in regulating the speech of the citizenry in general. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). Due to the government's countervailing interests, the "clearly established law" surrounding first-amendment rights of public employees follows not a bright-line rule, but a balancing test.

> The problem in any case is to arrive at a balance between the interest of the [public employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id.

When the district court applied the *Pickering* balancing test for its summary judgment analysis, it concluded that Sullivan was entitled to qualified immunity because "a resonable official would have found that

Bieluch's First Amendment rights were outweighed by the government's interest in promoting effecitve law enforcement in New Hartford". Without any specific factual basis, the district court simply concluded that Bieluch's speech "threatened effective police operations". The court did not make any findings regarding whether Bieluch's activities harmed his working relationship with First Selectman Smith, whether any of the letter's allegations of misconduct were true, whether Bieluch's speech interfered with efficient government operations, whether Bieluch's speech was a motivating factor in Sullivan's decision to transfer him, or what Sullivan's intent was in transferring Bieluch.

[8] The district court correctly acknowledged that Bieluch's speech was protected by the first amendment, but it did not accord it proper weight in the balancing test. To determine what degree of protecting to give first-amendment actions by a public employee, the threshold question is whether the speech at issue addresses a matter of public concern. *Rankin*, 483 U.S. at 384, 107 S.Ct. at 2896-97; *Piesco*, 933 F.2d at 1155. This is done by examining the form, content, and context of the statements, as revealed by the record as a whole. *Piesco*, 933 F.2d at 1155.

[9] Bieluch's speech concerned tax expenditures, town budgets, school construction, and the right to petition for referenda -- matters of utmost public concern. "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment

values'". *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S.Ct. 3409, 3425, 73 L.Ed.2d 1214 (1982) (quoting *Carey v. Brown*, 447 u.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980)). However, rather than weighing Bieluch's speech heavily in the balance, the district court treated it as if it, like the speech at issue in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), was only of limited public concern.

In *Connick*, an assistant district attorney, Sheila Myers, circulated a questionnaire among her co-workers soliciting their views on the office's transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees feld pressured to work in certain political campaigns. 461 U.S. at 141, 103 S.Ct. at 1686-87. She was fired later that day. The Court held that the only question in her questionnaire that touched upon a matter of public concern was the one asking the assistant district attorneys whether they "ever feel pressured to work in political campaigns on behalf of office supported candidates". The Court noted that Myers' superiors considered the questionnaire an act of "insubordination" that interfered with working relationships in the office. Since close working relationships were at issue and the vast majority of Myers' speech did not fall under the rubric of "public concern", the Court said that it was unnecessary "for an employer to allow events to unfold to the extent that the disruption of the office and the

destruction of working relationships is manifest before taking action". *Id.* at 152, 103 S.Ct. at 1692.

Picking up this cue from *Connick*, the district court opined that since a reasonable official would have perceived that Bieluch's speech "threatened effective police operations", the government's interests outweighed Bieluch's first-amendment interests. However, the district court failed to heed *Connick's* caveat that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern". *Id.* at 152, 103 S.Ct. at 1692.

[10] Without question, Bieluch's speech "more substantially involved matters of public concern" than did Myers' questionnaire about internal office procedures in *Connick*. While Myers prepared and distributed her questionnaire *at the office*, exercised her right to speak *at the office*, and questioned an *office* policy that was being applied to her, Bieluch spoke at town meetings and was involved in community taxpayer orgainzations. While Myers' speech touched upon matters of public conern in only the "most limited sence", *id.* at 154, 103 S.Ct. at 1693-94, all of Bieluch's actions, in contrast, contributed to debate on public issues, the very kind of speech the first amendment was designed to protect. *See NAACP v. Claiborne Hardware Co.*, 458 u.S. at 913, 102 S.Ct. at 3425-26; *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70, 84 S.Ct. 710, 720-21, 11 L.Ed.2d 686 (1964). As we held in *Piesco*, if the employee's speech substantially involved matters of

public concern, the government must make a stronger showing of interference with operations than occurred in *Connick*. 933 F.2d at 1159.

Sullivan claims on appeal that the district court found that Bieluch's political activities caused "actual disruption" in Bieluch's work-place. The district court never made such a finding. Because it was applying an "objective reasonableness" test, the district court feld that it was unnecessary to determine whether Bieluch's activities actually hampered law enforcement; instead, it found that Bieluch's speech "posed a potential threat" to police operations. Under *Piesco*, however, a potential threat could not outweigh Bieluch's first-amendment interests.

We therefore must determine whether the record supports a sufficient showing of interference with government operations to warrant a grant of summary judgment in favor of Sullivan. Although the qualified immunity defense turns on an objective test, rather than Sullivan's subjective intent, this does not bar an examination of the facts known to Sullivan at the time he decided to transfer Bieluch. The "reasonableness official" standard merely precludes an inquiry into whether Sullivan thought that he might be violating Bieluch's first-amendment rights. For our analysis, the critical question is whether a reasonable official in Sullivan's position would believe that the state's interests outweighed Bieluch's interests.

Drawing all inferences in favor of Bieluch, we conclude that his conduct did not hamper the efficient operation of law enforcement in any way. First, Bieluch has an excellent professional record. He was evaluated twice a year, and in his twenty-three years as a Connecticut state trooper, he never received an unsatisfactory evaluation. Aside from the letter to Sullivan, none of Bieluch's superiors had ever received any complaints, either formal or informal, about Bieluch's qualifications, integrity, or performance as a police officer. At the July 13, 1990, meeting, Lieutenant Hiltz told Bieluch that he had been doing a good job as resident trooper of New Hartford and that he was not being transferred because of any suggested wrongdoing.

Second, Bieluch's working relationship with First Selectman Smith was unharmed. Sullivan's claim that Smith requested Bieluch's transfer is contradicted by testimony from Smith, himself, that he never made such a request. According to Smmith, he thought sending the letter would prompt Bieluch's superiors to examine the ethical implications of Bieluch's political activities; he did not know if any of Bieluch's actions were in fact unethical. Although Smith said that he stopped trusting Bieluch, he also said that this did not affect their professional relationship. He met with Bieluch informally on a regular basis, and they never hesitated to meet whenever necessary. Smith testified that he felt that Bieluch was an effective, competent law enforcement official who was an asset to the town when he was a resident

trooper. Furthermore, Smith testified he had never seen anything dishonest or deficient in Bieluch's performance as a resident trooper and had never disagreed with any law enforcement action that Bieluch had or had not taken.

Finally, Sullivan did not verify any of the allegations in the letter before he transferred Bieluch. He did not even ask Bieluch about them. Sullivan testified that the letter did not mention "anything that was serious enough to warrant a real big investigation". If we draw all inferences in favor of Bieluch, it appears that none of the letter's allegations of misconduct is true. Bieluch testified during the preliminary injunction hearing that he never solicited signatures for petitions, issued any material that contained a deliberate misuse of statistics, conducted association business from his office in Town Hall, or engaged in dishonest tactics in connection with the taxpayers' organizations. He did not personeally approve all of the materials distributed by the two groups. With respect to parking his police vehicle at polling places, he said that he had never parked for longer than it took him to go inside and vote. His car was unmarked; it bore neither a police insignia nor flashing lights. As a resident trooper, Bieluch was permitted to drive his police vehicle twenty-four hours a day; in fact, troopers were encouraged to use the police vehicle in their off-duty hours, in case they needed to be recalled during an emergency.

Bieluch clearly had the right to express his views as an individual on public issues. A mere concern about public perception based on unverified statements by nine citizens is not sufficient to outweigh Bieluch's first-amendment interests. On the present record, it appears that Sullivan was not presented with any evidence that the state's law enforcement functions were being compromised, yet he transferred Bieluch summarily. Although Sullivan claims that he thought the transfer would allow Bieluch to continue being politically active in New Hartford, Bieluch was unable to attend any New Hartford Property Owners' Assocation meetings after his transfer to Litchfield, because he was assigned to the 4 p.m. to midnight shift.

We conclude that on the present state of the record it cannot be determined that a reasonable official in Sullivan's position would believe that the state's interests outweighed Bieluch's interests. To hold otherwise would seriously undermine the first-amendment rights of public employees. Whenever a government employee became personally involved in a controversial public issue, those on the opposite side of the issue could get the employee transferred or discharged simply by expressing a concern to the employee's superior that government functions were being threatened. The superior could then summarily act on this "concern" without giving the employee an opportunity to respond or investigating into the truth of the allegations. This is

not the type of official conduct that the doctrine of qualified immunity was designed to shield.

While summary judgment provides an expeditious way to dispose of insubstantial claims against government officials, *see Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738, Bieluch's claim warrants greater scrutiny. After he engaged in political speech, on the basis of concerns expressed by nine citizens, without verification of the allegations underlying those concerns, he was summarily transferred without any hearing and without even a review of his job performance. Because the law guaranteeing Bieluch's first-amendment rights was clearly established at the time of his summary transfer, it was inappropriate for this case to be resolved by summary judgment.

CONCLUSION

The district court did not accord Bieluch's speech sufficient weight in the *Pickering* balancing test. Because Bieluch's speech must be afforded the highest degree of protection offered by the first amendment, the government must make a stronger showing that merely perceiving a potential "threat" to effective government operations, without verifying the underlying allegations or even affording him an opportunity to respond. Summary judgment was improper.

Reversed and remanded.

WHITMAN KNAPP, Senior District Judge, dissenting:

As the majority properly notes, the diatribe signed by nine citizens including the First Selectman contains many accusations that we must for present purposes deem to be have been unfounded. However, it sets forth two undisputed facts: (1) plaintiff has entangled the First Selectman in litigation; and (2) he conducted a vituperative campaign accusing him and his colleagues of, among other things, possible fraud.

In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), an almost unanimous Court, speaking through Justice Marshall, set forth a balancing test by which could be determined the circumstance under which a State employee could exercise first amendment rights in attacking his or her employer despite the danger of jeopardizing the State's interest in "promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1735. The Court intended its opinion to provide "general lines along which" such a determination should be made. *Id.* at 569, 88 S.Ct. at 1735.

Using the facts before it as illustrative, it emphasized that the statements of the employee whose case was under consideration were "in no way directed toward any person with whom [he] would normally be in contact in the course of his daily work"; and consequently that "no question of maintaining ... harmony

among coworkers was presented. *Id.* at 570, 88 S.Ct. at 1735.

Since our plaintiff's conduct was precisely the opposite of that described in Justice Marshall's guidelines, I can not see how a "reasonable person" in Sullivan's position would have "known" that plaintiff had a constitutional right which Sullivan was violating by his reaction to such conduct. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S.Ct. 2727, 2737-38, 73 L.Ed.2d 396 (1972).

I am also troubled by the form of the majority opinion. It seems to me that the majority is actually saying that, based on all the facts developed in the course of about two years of litigation, it has concluded that Sullivan made a mistake in ordering plaintiff's transfer. I find little in the opinion directed to the question of what a reasonable person in Sullivan's position would have "known" when the decision to effect the transfer was made.

Although the opinion recognizes (at page 671 Lines 2-5) that the critical facts are those "known to Sullivan at the time he acted," it proceeds to base its findings upon facts largely developed in the course of the ensuing lawsuit.

I therefore respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of September one thousand nine hundred and ninety-three.

BIELUCH V. SULLIVAN
DOCKET NUMBER: 92-9314
[FILE STAMPED SEPT. 9, 1993]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee Bernard Sullivan.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further ordered that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
ELAINE B. GOLDSMITH,
Clerk

THE COURT: All right.

MR. LANOUE: Call Commissioner Sullivan.

BERNARD SULIVAN (Called as a Witness and Sworn)

THE CLERK: State your full name and spell your last name for the record:

THE WITNESS: Bernard Sullivan, S-U-L-L-I-V-A-N.

THE CLERK: Your address.

THE WITNESS: One hundred Washington Street, Hartford, Connecticut.

DIRECT EXAMINATION BY MR. LANOUE

Q. What position do you presently hold with the State of Connecticut:

A. Commissioner of Public Safety.

Q. And how long have you held that position?

A. About ten months.

Q. Prior to that were you involved in law enforcement in any way?

A. Yes, I was.

Q. In what way?

A. I served the City of Hartford as a police officer for 25 years, the last seven of which were as chief of police for the city of Hartford.

Q. What kinds of duties and functions have you had in your law enforcement career?

A. Just about everything imaginable. Walked the beat, drove a cruiser, worked accident investigations, worked narcotics squad, burglaries, homicide, robbery, command the intelligence division, commanded the homicide and robbery, command hostage negotiations, worked Internal Affairs, worked as a patrol commander held the ranks of patrolman, sergeant, lieutenant and captain and then chief. Worked in communications, worked in the cellblock area dealing with prisoners. Just about every facet imaginable in policing.

Q. What experience have you had in the administration of a police agency?

A. I was chief of police for the City of Hartford for seven years. I was responsible for an agency that was comprised of 500 sworn, about 125 civilian, with an operating budget of that, during that period of time ran from roughly 15 to about 25 million dollars a year.

Q. And you have also been Commissioner of Public Safety, is that correct?

A. I have been Commissioner of Public Safety for the past ten months, yes.

Q. In these positions as Chief of Police of the City of Hartford and Commissioner of the Department of Public Safety have you been exposed to virtually all forms of administrative duties and functions?

A. Yes.

Q. Including the operation of those departments?

A. The operation of the department, the administration, the budget process, the whole thing from A to Z.

MR. LANOUE: Your Honor, I'd like to ask the Court to recognize Commissioner Sullivan as an expert in the administration and operation of a law enforcement agency.

MR. SCHOENHORN: Well, I'm going to object. There are certain aspects of law enforcement he can be an expert in, but since he's only been in the state police for ten months, I don't think he can be considered an expert in such things as the resident trooper program or state police functions. So therefore, I'm not sure of the purpose of his being declared as an expert as well. He's the named defendant.

MR. LANOUE: I want to ask him questions, Your Honor, as to his opinion on the effective operations of a police organization vis-a-vis the community and other aspects.

THE COURT: I don't think that I have to determine now whether or not he's an expert. I mean, I know the Commissioner's qualifications. He's just recited them. And I will, as the fact finder here I will make a determination myself when I, during my deliberations as to whether or not his testimony on a particular issue is credible or not credible in terms of his expertise. So, I don't think I have to make that ruling now. Go ahead.

Q. (By Mr. Lanoue) Commissioner Sullivan, did you make a decision to transfer Trooper Bieluch from New Hartford?

A. Yes, I did.

Q. Why did you reach that decision?

A. Because I felt that at the time, after considering all the facts known to me, discussions with my subordinate staff, that it was in the best interests of the department and Trooper Bieluch to give him another assignment other than resident trooper in the town of New Hartford.

Q. In making that decision, what concerns played a role?

A. I have to be concerned with the effective and appropriate delivery of police services no matter what town we're discussing here. Whether it's a state or town issue or city issue, that's one of my responsibilities, and I take it very seriously.

I think that we received a letter, I asked staff to look into it. I knew a little bit of the history. I knew Trooper Bieluch was very involved in his town, which is all well and good. I was concerned, one, that there would be a perception that the state police department would not be impartial because of his strong identification with a partisan issue here that appeared to be heating up by the day, and my concern was it hadn't been resolved, so it would continue heating up, and the more it heated up the more I would have to worry about how

his position looked and what type of decisions he made and what people felt were the motivating factors.

On the other hand, I also felt in fairness to him why should he be a target, why should he get into a position where everything he does subjects him to over-scrutiny in comparison to the other troopers? And I -- certainly this was one of the issues that I made very clear with everybody, that I do not want him, did not want him to in any way think we wanted him to cease his political activity, because that was not the case whatsoever.

I just felt it appropriate for the department and himself, that he do that with a different assignment, that he not be identified as the resident trooper because I don't believe in the position of resident trooper, as I see it, being akin to the chief of police of a small town, that you can separate Trooper Bieluch from PAC president Bieluch. I don't think that that can be done, and I think what you are dealing with is an issue that was just beginning to percolate.

If my feeling was hey, it wasn't resolved, had the potential for percolating further, getting more heated on both sides, clearly putting the department and Mr. Bieluch individually in a position of over-scrutiny. The appearance of maybe making inappropriate decisions, impartial -- not impartial decisions because of how people would interpret facts to be depending on what side of the issue they were on. And I felt that would hamper

clearly the affect of an appropriate delivery of police services to the town of New Hartford.

Q. In your experience what part does public perception play in the effective delivery of law enforcement?

A. A tremendous --

MR. SCHOENHORN: Again, I object to the question for the reasons previously stated.

THE COURT: Overruled.

THE WITNESS: A tremendous part. However the public perceives a police organization will depend, will show how they react with the department. If a public community starts to lose faith or confidence in the police agency, there's a multitude of things that can happen. One, they may very well stop reporting things that we want to have reported to us, that they don't have confidence in us so they may not come to us about information about drugs and things of that sort.

Two, the department will come under tremendous scrutiny for every little thing that it does. If the community has no confidence then everything the department does it needs to explain in great detail. People write letters and file complaints asking for greater explanation of why the department took action in certain cases.

Critically, if you get involved in a critical incident, you know, an officer using deadly force or an officer using non-deadly but appropriate physical force in restraining a prisoner, that sort of thing, if the public

does not have confidence in that officer or that police agency, then the public may very well come away with the perception that excessive force was used simply because of the department's reputation. Simply because the department does not have a reputation of being impartial.

The public may perceive that certain arrests are not based on fact but rather on the department's quick judgment, the "let's make an arrest and get it out of the way", whereas on the other side if the community has confidence, and you can see that across the country, I think the easiest example is for the use of deadly force. If you have a department that has community confidence when deadly force is used you will not get the volatile eruption that you would get when a department that has got no public confidence engages in that same act.

Very often you will see civil disorder come about merely because not necessarily the facts of the case, because it may have been appropriate at the time, because, merely because somebody did not believe, some community did not believe that that department had a reputation for acting impartially.

Q. Would your department be required to investigate complaints of impartial -- partiality or unfairness on the part of Trooper Bieluch?

A. Certainly if somebody make a complaint that he'd made an arrest in an impartial fashion or handled a complaint in an impartial fashion, yes.

Q. Based on your experience, a person in Trooper Bieluch's position, if he is viewed by the community as being strongly on the side of an issue of public concern, has that in your experience had any effect on their confidence in the delivery of legal service?

A. I think any time the community believes that an officer is not acting in a totally neutral and impartial manner, that that officer is in any, in any way taking sides on political issues or anything of that sort that they will lose a degree of confidence in the officer's ability to perform.

Q. The experience that you just talked about, did that play any role in your decision?

A. Yes.

Q. What role did it play?

A. Well, clearly I was trying to come to the Catch-22 decision that you have to make. It's not an easy decision protecting Trooper Bieluch's rights, because certainly he has a right to speak out on political issues, and I have no problem with that but also protecting the department, so in effect when he spoke out personally it did not get interpreted as being any position of the department taking on any position that he is taking as a law enforcement person.

And trying to balance that clearly my experience had to do with that. I dealt with situations over the years as a police officer on a particular beat in the city, becoming vocally involved in something that was a community issue in that neighborhood, and removing him

because of too much of identification, too much of an involvement where people on the other side would start to get the perception that "Well, he's for this; if he's for this and we're not for it then he is or he is not going to treat us the same way." So clearly my experience tells me that it's really critical to police officers at all times to have that image of neutral and impartial application of the law for the efficient and appropriate delivery of service.

Q. Have you had any experience dealing with chief executive officers in your positions?

A. Yes. I have dealt with council people, city managers. Since I became the Commissioner I had meetings with difference first selectmen in different towns on public safety issues.

Q. Your knowledge of what was going on in the Town of West Hartford, did that cause any concern for you?

A. You mean New Hartford?

Q. Sorry, New Hartford?

A. Yes.

Q. In regard to Trooper Bieluch's activities?

A. Yes.

Q. What concern?

A. Well, again concerning that he'd been so publicly identified with a partisan issue out there that the perception could arise that the people on the other side of this issue would not believe that he would treat them impartially and maintain a totally professional

stance when dealing with them, because of the inability, be it real or perception it's an issue to deal with, to separate Trooper Bieluch from Mr. Bieluch.

The resident trooper becomes, you become very well-known in the town. From what I see it's very akin to being the chief of police in a small town. I have not visited New Hartford as such, but I have visited other towns and looked at other resident trooper positions since coming on board, and very much they are identified similarly to what a chief of police would be identified as. They are considered the chief executive of law enforcement in that community.

Q. Based on your experience in regard to working with chief executive officers, would it be your opinion that Trooper Bieluch might have difficulty addressing concerns with the first selectman regarding law enforcement?

A. Absolutely. Human nature. People can also say we will agree to disagree and be professional, but life's experience tells us the hotter an issue gets the more deeply entrapped people get, the further away we get from that situation that we would like to hold that everybody will always agree to disagree. Clearly when people get real heated on sides of an argument they tend first of all to break off communication and opportunity to talk to each other. It they don't have confidence in each other they would rather not deal with each other.

Q. Would it -- would you have any problem in waiting for that kind of thing, those kinds of things to manifest themselves?

A. No, I think my responsibility is to assure that they don't get to the point where they become reality. Because I think it's too late then, the damage has occurred, either damage has occurred that somebody has been treated impartially. On the other side, Trooper Bieluch has been put into a no win situation. He's had to take appropriate action but is now being accused of using judgment in a different manner than normal because somebody felt he did it because he was on the other side of the issue, again trying to balance both of those issues.

Q. Was it your purpose in transferring Trooper Bieluch to Troop L to punish him for speaking out on these issues?

A. Not at all.

Q. Was your purpose or motivation to retaliate against him for what he was saying?

A. Not whatsoever. I encouraged his activities.

Q. Did you believe that Trooper Bieluch could continue to speak out on these issues?

A. I certainly did if he was transferred, yes.

Q. If Trooper Bieluch were to continue to speak out would you take any action against him?

A. After the transfer? No, none whatsoever. None whatsoever.

Q. Would you retaliate against him for speaking out for the town of New Hartford?

A. No, not at all.

THE COURT: Is what you are telling me, Commissioner, that it wasn't his activity or his speech that you, that formed the basis for the transfer, but it was your attempt to anticipate future problems, is that what you are saying?

THE WITNESS: Yes, Your Honor. We received a letter, I admit it was only signed by I think nine people, and I know my labor relations people had some conversations, but my concern was more of this issue was ongoing, dealing with the budget, which is a volatile issue in any town in Connecticut today if you can't get your budget through. That it was only going to escalate from what I could see. And being on the opposite side I was really concerned this identification would increase rather than subside.

And why leave him or the department in that position where it could be construed that we had become impartial by people? Why be in the position where every time some little thing happened we'd have to respond to a community against Trooper Bieluch or a community against the department simply because this issue was so divisive and so publicly outspoken in the town?

I felt it was in everybody's interests to eliminate that, you know. Why take that risk? Eliminate it, put

Trooper Bieluch in another assignment, let him conduct himself in his political action, but at least over there we can say very clearly hey, he's not even assigned that patrol in that town, he has no direct impact on delivery of police services, there's no need for him to be recognized as the law enforcement official within that town any longer. He's strictly acting only on his own as a citizen and he has rights, which we totally support him that right.

Q. (By Mr. Lanoue) Commissioner, again, did you or did you not conclude based on your experience that in order to continue the functions of the department in the town of New Hartford based on Trooper Bieluch's activities that it was necessary for you to transfer him?

A. Absolutely. I felt that to continue the good and appropriate delivery of police services in that town it would be necessary to place Trooper Bieluch in another assignment so that people could not misinterpret what was going on in any way, shape or form, or be distanced in any way, shape or form from the department's activities, which would hurt our ability to interact with the community as a whole.

Q. And that judgment was based on your experience as well as the information that was provided to you?

A. Yes, sir.

Q. And once again, this is a contractual relationship with the town, is it not?

A. Yes, it is.

Q. And is it important to you or to the department to maintain good relationships between the department and the elected officials of the town?

A. Absolutely, because in a sense through the contract there was a sharing of responsibility for public safety within the town. A financial sharing to begin with where the town pays sixty percent of the cost, we pay forty percent, but additionally a sharing between the -- by virtue of their authorities, the chief elected official, I would call him the administrative chief of police, or her, whatever the case may be, and then the resident trooper is like the operational chief.

Because the chief elected official in conjunction with the trooper have to work together, have to set the department's goals. They have to deal with okay, if there's an operational problem how much is it going to cost; is the first selectman going to support that in his budget?

Q. These two things have to go hand in hand?

A. I don't think you can separate the two. It's a very unique situation, almost like having a partnership in the role of chief of police.

Q. You heard the testimony of the constable in this case. Did any of that testimony cause you any concerns?

A. Yes. I had heard the constable testify --

MR. SCHOENHORN: I'm going to object to whether or not -- it's irrelevant whether testimony caused concern. I suppose any adverse testimony could cause the witness concern.

THE COURT: Yes, I will sustain the objection as to the form of the question, Mr. Lanoue. I think you have to be more specific as to what it is that you are getting at.

Q. (By Mr. Lanoue) What is the relationship between a constable and a resident state trooper under the program?

A. The constable is supposed to be subordinate to the resident state trooper.

Q. There's a working relationship there?

A. Oh, yes. They have to work hand in glove. The constable in effect is supposed to be reporting to the trooper because our chain of command has our trooper report to the sergeant. On this contract issue where the trooper is dealing with the contract the senior trooper should be managing the local resources.

Q. Should there be any tension between the constable and a resident state trooper over --

A. Not if it can be avoided, because they need to work together. They are both serving in the same town. These are small departments, not like where two people can disagree within five hundred people and you can kind of put them on opposite ends of the department. In a small department they were working hand in

glove so it's essential they have an ongoing, good relationship.

Q. Do those kinds of problems form some of the reasons why you anticipated difficulty in this situation?

A. Sure, it's all those problems. It's the idea again of the trooper unfortunately being identified so strongly with the issue. I just don't see where you can separate Trooper Bieluch from resident trooper -- or from Mr. Bieluch in the sense that this residence issue where he's so clearly identified as the law enforcement source for that community.

Q. And your, again your concern was not what Mr. Bieluch was talking about?

A. Not at all. He certainly has the right to speak out on these issues that he believes in as an individual.

Q. And are you aware of him ever making any public comments derogatory of the state police?

A. Not to my knowiedge, no.

Q. And you not did attempt to punish him for speaking out?

A. This was not done in any sense for punishment, any sort of it. I honestly made the decision on what I thought was the best interests of the department and the best interests of Trooper Bieluch.

Q. And you exercised your judgment based on your experience to do that, is that correct?

A. Yes, I did.

MR. LANOUE: Thank you, Your Honor.

THE COURT: All right, Mr. Shoenhorn.